

Straining Territorial Incorporation: Unintended Consequences from Judicially Extending Constitutional Citizenship

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I. INTRODUCTION

For nearly a century, the *Insular Cases* have provided the rickety, constitutionally dubious foundation upon which the law of United States Territories was built. The doctrine of territorial incorporation,¹ which serves as its foundation, is approaching the centenary of its unanimous endorsement by the Supreme Court.² The doctrine essentially states that the territories are not “a part” of the United States, but are “merely belonging to it.”³ The *Insular Cases* and their progeny divided the states from the territories,⁴ making them “foreign . . . in a domestic sense.”⁵ Congress, by statute, extended citizenship to the inhabitants of all U.S. territories except the American Samoans, who are U.S. nationals.⁶ This national status endures partly from congressional inaction and partly because American Samoans themselves are split on the issue. American Samoan political leaders have generally opposed citizenship,⁷ fearing

¹ Essentially, the Constitution applies fully only in “incorporated” territories that are “surely destined for statehood” and are explicitly incorporated by an act of Congress or treaty, while the Constitution applies partially in “unincorporated” territories. See *Boumediene v. Bush*, 553 U.S. 723, 757–64 (2008); see also *Definitions of Insular Area Political Organizations*, U.S. DEP’T OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, <https://www.doi.gov/oia/islands/politicatypes> [<https://perma.cc/R3SQ-PNTK>] (explaining terms related to the U.S. Territories, including incorporated and unincorporated territories). All the current, populated U.S. Territories (American Samoa, Guam, The Northern Mariana Islands, Puerto Rico, and The U.S. Virgin Islands) are unincorporated.

² See *Balzac v. Porto Rico*, 258 U.S. 298, 300, 305 (1922).

³ *Id.* at 305.

⁴ The *Insular Cases* are themselves numerous and not precisely defined; different authorities propose different cases. Compare *Boumediene*, 553 U.S. at 756–57 (referring to six cases as the *Insular Cases*), with Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 798 n.2 (2005) (analyzing “eight of the *Insular Cases*”). See also *infra* Part III (discussing the relevance of the cases at present).

⁵ *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

⁶ 8 U.S.C. § 1402 (2012) (Puerto Rico); 8 U.S.C. § 1406 (2012) (United States Virgin Islands); 8 U.S.C. § 1407 (2012) (Guam); 48 U.S.C. § 1801(301) (2012) (Commonwealth of the Northern Mariana Islands); 8 U.S.C. § 1408(1) (2012) (covering American Samoa).

⁷ See Fili Sagapolutele, *Federal Judge Grants ASG and Amata “Permissive Intervention”*, SAMOA NEWS (Sept. 14, 2018), <http://www.samoanews.com/local-news/federal-judge-grants-asg-and-amata-permissive-intervention> [<https://perma.cc/352Z-8AXT>] (discussing American Samoa Congresswoman Aumua Amata and the American Samoan Government’s intervention against the plaintiff in *Fitisemanu*); Brief in Opposition by Respondents American Samoa Government and the Office of Congresswoman Aumua Amata of American Samoa at 1, *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (No. 15-981). But see 1982 *Omnibus Territories: Hearing on S. 2088, S. 2089, S. 2090, S. 2632, S. 2633, S. 2729, and S. 2888 Before the S. Comm. on Energy and Natural Resources*, 97th Cong. 241–42 (1982) (statement of Congressman Fofō I.F. Sunia, Delegate of American Samoa) (Representative Sunia stating his support for U.S. citizenship despite his constituents’ concerns).

collateral harm to their culture.⁸ American Samoans may travel freely to the United States, but on the mainland, they face difficulties citizens would not, which has recently sparked litigation.⁹

Fitisemanu v. United States, the most recent action involving the national/citizen distinction, is currently underway in the Federal District Court for the District of Utah.¹⁰ John Fitisemanu and his co-plaintiffs currently live in Utah but were born in American Samoa, and as a result, they are U.S. nationals and did not become U.S. citizens at birth.¹¹ The plaintiffs assert their national status unfairly causes them “unique obstacles” in obtaining work, accessing government benefits, and sponsoring the immigration of family members, and demeans them as second-class Americans.¹² The plaintiffs seek a decision extending the Fourteenth Amendment’s guarantee of citizenship to American Samoans.¹³

The plaintiffs in *Fitisemanu* seek a different result from the recent decision in *Tuaua v. United States*, where the D.C. Circuit rejected a substantially similar effort to extend constitutional citizenship as inconsistent with territorial

⁸ See FUTURE POLITICAL STATUS STUDY COMM. OF AM. SAM., FINAL REPORT 64–66 (Jan. 2007) [on file with *Ohio State Law Journal*] (recommending “American Samoa not seek US citizenship for its people at [that] time”); Rose Cuisson Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 128 (2018); Stanley K. Laughlin, *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 331 (2005) [hereinafter Laughlin, *Cultural Preservation*]; Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL’Y J. 325, 341 (describing those cultural practices); see also WILLIAM O. JENKINS, U.S. GOV’T ACCOUNTABILITY OFFICE, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 24–25 (2008) (noting the American Samoan people greatly value their traditional matai governmental and communal land tenure systems).

⁹ See *Tuaua*, 136 S. Ct. at 2461 (denying certiorari); Complaint, *Fitisemanu v. United States*, 1:18-cv-00036, 2018 WL 6068535 (D. Utah Mar. 13, 2018) [hereinafter *Fitisemanu Complaint*].

¹⁰ *Fitisemanu v. United States*, No. 1:18-cv-00036, 2018 WL 6068535 (D. Utah Sept. 10, 2018). Regardless of its outcome, this case will likely be appealed to the Tenth Circuit.

¹¹ See *Fitisemanu Complaint*, *supra* note 9, at 2.

¹² See *id.* at 3–6 (describing a statement printed on American Samoans’ passports stating: “THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN,” as a “badge of inferiority” they are forced to wear and this “inferior status” “diminishes their standing in their communities and in our Nation as a whole” and “inflicts irreparable and continuing harm”). Plaintiff John Fitisemanu’s career opportunities have been limited, because many government civil service positions require citizenship. *Id.* at 5. Plaintiff Pale Tuli, for example, cannot become a police officer because he is not a citizen. *Id.* at 5–6. No plaintiff is eligible to vote. *Id.* at 5.

¹³ *Id.* at 33–34 (including the finding that 8 U.S.C. § 1408(1) is unconstitutional, that U.S. State Department policies identifying American Samoans as non-citizen nationals are unconstitutional, an injunction against enforcing such policies, and an order to use new passports recognizing plaintiffs’ citizen status).

incorporation and the *Insular Cases*.¹⁴ The *Fitisemanu* plaintiffs ultimately seek a circuit split.¹⁵ *Fitisemanu* makes three claims for relief,¹⁶ advanced under three theories.¹⁷ Taken together, the *Fitisemanu* plaintiffs assert the Supreme Court should extend Fourteenth Amendment birthright citizenship to American Samoa *without* abrogating the *Insular Cases* and their doctrine of territorial incorporation.¹⁸ However, the plaintiffs and their amici still question territorial incorporation's validity.¹⁹ Their argument is likely structured in this way to convince the court to distinguish its ruling from *Tuaua*,²⁰ but it could lead higher courts to question the constitutional standing of the entire doctrine of territorial incorporation.

Arguing against the *Insular Cases* is no small matter. Currently, they give Congress vast constitutional latitude to govern the unincorporated territories and provide a "peculiar kind" of "constitutional theory of secession."²¹ If the *Insular*

¹⁴ *Tuaua v. United States*, 788 F.3d 300, 306 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

¹⁵ Motion for Summary Judgment and Memorandum in Support of Plaintiff at 26, *Fitisemanu*, 2018 WL 6068535 (D. Utah Mar. 30, 2018) [hereinafter *Fitisemanu* Summary Judgment Motion].

¹⁶ First, that the Fourteenth Amendment's guarantee of citizenship at birth applies to America Samoa. *Fitisemanu* Complaint, *supra* note 9, at 8–12. Second, that American Samoa should be considered "Subject To The Jurisdiction" of and "In" the United States. *Id.* at 12–18. Third, their current status deprives them of equal dignity and stigmatizes them as second-class Americans. *Id.* at 18–29.

¹⁷ First, that the *Insular Cases* are irrelevant to determining the geographic scope of the Fourteenth Amendment Citizenship Clause, which functionally requires overruling them. *Fitisemanu* Summary Judgment Motion, *supra* note 15, at 30–32. Second, even if the *Insular Cases* control, the Citizenship Clause still applies within their framework. *Id.* at 33–37. The plaintiffs also contend the State Department's policies violate the Administrative Procedures Act, but this claim is not analyzed in this Note. *Id.* at 38–39.

¹⁸ *Id.* at 30–33.

¹⁹ *Id.* at 28–32 (suggesting the *Insular Cases* may not remain good law and highlighting the racial animus incorporated into the decisions); Memorandum for Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party at 15–22, *Fitisemanu*, 2018 WL 6068535 (D. Utah Apr. 24, 2018) [hereinafter *Constitutional Law Amici Curiae* Memorandum] (describing "[t]he notion that some territories are 'incorporated' while others are not" as "constitutionally infirm" and also discussing the history of racial animus associated with the decisions).

²⁰ This may have struck a chord with the court. During oral arguments, the judge challenged the United States with questions and statements such as: "I don't have to overrule [the *Insular Cases*], they don't apply to this case. That's all I have to find." Transcript of Oral Argument at 32, *Fitisemanu*, 2018 WL 6068535 (D. Utah Nov. 21, 2018).

²¹ See Burnett, *supra* note 4, at 802–03, 877 ("If the *Insular Cases* must be understood as authorizing the deannexation of U.S. territory, then it is polemical, but by no means preposterous, to see these cases as setting forth nothing less than a constitutional theory of secession (albeit of a peculiar kind). Giving tooth to this claim would demand engagement with recent historical scholarship working to situate the United States' imperial experiment with respect to the racial, social, political, and constitutional crises of the Civil War and its aftermath. . . . Although I have stopped short of developing a full-fledged 'secessionist'

Cases were abrogated, the territories would be instantly incorporated and permanently bound to the United States, which would remove independence as an option for any territory's final status.²² Should the court adopt the *Fitisemanu* plaintiffs' contention that the Citizenship Clause of the Fourteenth Amendment applies *sui generis* in the territories, but leaves territorial incorporation unaltered, it would breathe life into a constitutional guarantee of citizenship that would still place major constraints on any plan for a territory's independence.²³

This Note considers the potential results of such a ruling. The precise nature of the final decision is profoundly important, as the full abrogation of territorial incorporation constitutionally closes the door on independence as a possible final status for any territory. However, a ruling extending birthright citizenship to the territories under a *jus soli*²⁴ argument that leaves the *Insular Cases* undisturbed would limit the territories' options, but still permit a qualified form of independence.²⁵ The inability to provide adequate representation for the territories is one of, if not *the* longest lasting, constitutional failures in the American system of government.²⁶ For more than a century, the United States has endured this rot within the Constitution's framework. The United States must ensure full self-government for each territory on its own terms.²⁷ Rectifying this unequal status benefits citizens and nationals both in the territories and the states, as the health of the American system of government is undermined when millions of people under the American flag persist in an unconstitutional quasi-colonial status.

Part II of this Note provides a brief background on the legal history of the U.S. territories. Part III examines the *Insular Cases*, particularly *Balzac v. Porto*

interpretation of the *Insular Cases* in this Article, such an understanding could be defended in part on the basis of the deannexationist account I have offered here . . . ”).

²² See *infra* Part V.A.

²³ See Burnett, *supra* note 4, at 877.

²⁴ *Jus soli* is a British common law doctrine finding reciprocal bonds of allegiance between the subject and sovereign, articulated most prominently by Sir Edward Coke in *Calvin's Case*. See Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1046–48 (2008) (discussing the case and doctrine); *infra* Part IV.A.

²⁵ See *infra* Part V.A.

²⁶ See, e.g., Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1528 (2008) (discussing the problems with democracy and government that unincorporated territories face); Rafael Hernández Colón, *The Evolution of Democratic Governance under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587, 591 (2017). Additionally, one could argue that the problem has existed for the United States' entire history, given the status of Washington, D.C. and its citizens. While I recognize similarities between D.C.'s status and the territories, including the specter of racial animus in their histories, the fact that D.C. has no claim to international self-determination makes it a distinct, although still relevant, problem requiring a different resolution.

²⁷ See Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 234 (2017) (discussing normative problems with the current U.S. territorial legal regime).

Rico,²⁸ in conjunction with *Texas v. White*, arguing *Balzac* permits the United States to cede or deannex an unincorporated territory, which is otherwise impossible for incorporated territories under *Texas v. White*. Part IV explores the difference between constitutional protections for citizenship in U.S. territories and the mainland under current law and how the application of Fourteenth Amendment birthright citizenship to the territories could permanently bind them to the Union. Part V considers possible resolutions to *Fitisemanu*, arguing that the doctrine of territorial incorporation, while seriously flawed, should be retained and control this case. The courts should not extend Fourteenth Amendment birthright citizenship to American Samoa or any territory. Although the status quo is unacceptable, it preserves the most options for Congress and the people of the territories to decide their futures. Part VI proposes, should the *Fitisemanu* plaintiffs prevail, that especially intimate compacts of free association can serve as a backstop to preserve much of the current system's benefits and permit significant opportunities for self-government. Part VII briefly concludes.

II. BACKGROUND AND HISTORY OF THE U.S. TERRITORIES

The United States has held territories since the nation's founding, but originally they were always considered destined for statehood—until the *Insular Cases* and the American quest for empire in the late 19th century.²⁹ After defeating Spain in the Spanish-American War, the United States acquired its first unincorporated territories: the Philippines, Puerto Rico, and Guam, from Spain.³⁰ The United States annexed American Samoa pursuant to the 1899 Tripartite Convention with Great Britain and Germany.³¹ In 1916, Congress set

²⁸ *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *Porto Rico* was a common spelling used at the time, while *Puerto Rico* is used at present. This small inconsistency is retained throughout this Note in favor of consistency with the original text.

²⁹ See Burnett, *supra* note 4, at 798–801. It seems reasonable that Justice White in *Downes* would contend there were only incorporated territories during American history until overseas insular expansion. See *Downes v. Bidwell*, 182 U.S. 244, 321 (1901) (White, J., concurring). Interestingly, this uncertainty about the status of the doctrine of territorial incorporation before the *Insular Cases* was raised in the *Fitisemanu* oral arguments. See Transcript of Oral Argument, *supra* note 20, at 15–20.

³⁰ Treaty of Paris, Spain-U.S., Dec. 10, 1898, S. TREATY DOC. NO. 62 (1898) (Spain ceded Guam and Puerto Rico to the United States, but the Philippines were technically purchased for twenty million dollars).

³¹ Tripartite Convention, Settlement of Claims in Samoa, Ger.-U.K.-U.S., Dec. 2, 1899, AM. SAM. B. ASS'N, https://www.asbar.org/index.php?option=com_content&view=article&id=1949:convention-of-1899&catid=112&Itemid=183 [https://perma.cc/L6U4-3EZ4] (ceding the current territory of American Samoa to the United States, and what is today the Independent State of Samoa to Germany, with Britain renouncing its claims). This acquisition was preceded by a series of brutal Samoan civil wars. See William R. Tansill, CONG. RESEARCH SERV., AMERICAN SAMOA: A DESCRIPTIVE HISTORICAL PROFILE 28–29 (1974). Substantially weakened, the Samoans petitioned the United States and Britain for annexation on multiple occasions, hoping to guarantee social and political stability while

the Philippines on the path to independence, and the United States purchased the Virgin Islands from Denmark.³² Congress passed the Jones Act of 1917,³³ giving citizenship to the Puerto Ricans.³⁴ Following the Second World War, the United States granted independence to the Philippines,³⁵ and in 1947 received the Trust Territory of the Pacific from the United Nations (U.N.).³⁶ Since 1946, the U.N. has considered all the unincorporated territories, except Puerto Rico,³⁷

preventing German domination. *Id.* at 37–38. In 1901 and 1904, the Samoans issued deeds of cession to the United States, which outlined why the Samoans desired U.S. control. Cession of Tutuila and Aunu'u, Samoa-U.S., Apr. 17, 1900, AM. SAM. B. ASS'N, https://www.asbar.org/images/unpublished_cases/cession1.pdf [<https://perma.cc/J8D E-8WK F>]; Cession of Manu'a Islands, Samoa-U.S., July 14, 1904, AM. SAM. B. ASS'N, https://www.asbar.org/images/unpublished_cases/cession2.pdf [<https://perma.cc/K7 H7-DFX 9>]. The deeds were eventually confirmed and accepted by the Senate in 1929. 48 U.S.C. § 1661(c) (2012). One could argue these deeds, in fact, are actually the mechanism through which the territory was annexed.

³² See the Philippine Autonomy (Jones) Act of 1916, Pub. L. No. 64-240, 39 Stat. 545 (1916) (“Whereas it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands”); Treaty of the Danish West Indies, Den.-U.S., Aug. 4, 1916, <https://www.doi.gov/sites/doi.gov/files/migrated/oia/about/upload/vitreaty.pdf> [<https://perma.cc/SH29-482U>] (purchasing the present-day United States Virgin Islands).

³³ Jones (Jones-Shafroth) Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

³⁴ See José Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 396–98, 403 (noting the extension of citizenship occurred by a Congress “[i]ndifferent or hostile” to eventual statehood and “unaware of any clear-cut or vigorous” independence movement meant to signal a permanence in the U.S.-Puerto Rican relationship, unlike that with the Philippines). In addition to this permanence, interestingly, the idea of eventual statehood for Puerto Rico was publicly contemplated. 51 CONG. REC. 16,034 (1914) (statement of Rep. Borland) (“I anticipate final statehood for Porto Rico. I have no hesitation about saying that.”).

³⁵ Philippines Independence (Tydings-McDuffie) Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).

³⁶ The Trust Territory includes the present-day Republic of the Marshall Islands, Federated States of Micronesia, Republic of Palau, and the U.S. Commonwealth of the Northern Mariana Islands—Japan’s former Pacific colonies, taken after the Second World War. The U.N. Trusteeship system had its origin in the League of Nations Mandate System, the idea being that the territories were held in trust for their inhabitants who would one day be permitted to choose full independence or continue to be ruled by their Trustee. Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ILSA J. INT’L L. 1, 1–9 (1993). Ultimately the Northern Mariana Islands chose to remain under American control. *Id.* at 12–13. The Marshall Islands, Micronesia, and Palau chose independence, but to establish treaties of free association with the United States. See *id.* at 13–16.

³⁷ G.A. Res. 748 (VIII), at 25–26 (Nov. 27, 1953) (removing Puerto Rico from the list of non-self-governing territories); see also Developments in the Law, *The International Place of Puerto Rico*, 130 HARV. L. REV. 1656, 1657–65 (2017) (criticizing the United States’ treatment of Puerto Rico and the U.N.’s decision to remove it from the list of non-self-governing territories).

as “Non-Self-Governing” Territories.³⁸ This designation prompted the creation of a special compact for Puerto Rico in 1953,³⁹ which led to its removal from that list.⁴⁰ However, Puerto Rico’s status remains subject to scrutiny from the U.N. Special Committee on Decolonization and criticism by countries opposed to the United States.⁴¹

Almost every territory has a constitutional system of government authorized by Congress, which resemble the systems of government employed in the fifty states.⁴² Uniquely, American Samoa is still governed under the original 1929 congressional delegation of power to the Executive, so the Secretary of the Interior exercises substantial authority.⁴³ The international embarrassment the United States suffers from its failure to fully enfranchise its territorial population pales in comparison to the United States’ normative failure to fulfill its own fundamental promises of popular self-government and political equality.⁴⁴

³⁸ See *Non-Self-Governing Territories*, UNITED NATIONS (2017), <https://www.un.org/dppa/decolonization/en/nsqt> [<https://perma.cc/CS8E-HVJ2>]; U.N. Charter art. 73 (discussing guarantees made to the people of non-self-governing territories).

³⁹ Puerto Rico Federal Relations Act of (July 3) 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950) (granting substantial autonomy to Puerto Rico). Despite the potential importance of that statute, Puerto Rico’s constitutional status remains essentially the same. See Peralta, *supra* note 27, at 243–53 (discussing how that statute, also known as the Compact was a “constitutional mirage,” the gradual deterioration of the idea that Puerto Rico had a status different from any other territory, and how “PROMESA seems to be the culmination of colonial government”).

⁴⁰ G.A. Res. 748 (VIII), at 25–26 (Nov. 27, 1953).

⁴¹ See *supra* text accompanying note 37; Rep. of the Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, at 16, U.N. Doc. A/AC.109/2017/L.13 (Feb. 12, 2018) (noting criticism from countries including Bolivia, China, Cuba, Russia, Syria, and Venezuela).

⁴² 48 U.S.C. §§ 1421–28 (2012) (pertaining to Guam); §§ 1801–08 (pertaining to the Northern Mariana Islands); §§ 731–916 (pertaining to Puerto Rico); §§ 1541–1645 (pertaining to the U.S. Virgin Islands). That is to say the territories have a tripartite separation of powers between an executive, bicameral legislature, and judiciary, and their constitutions guarantee similar rights.

⁴³ 48 U.S.C. § 1661(c) (2012) (vesting “all civil, judicial, and military powers” in the President “[u]ntil Congress shall provide for the government of such islands”); Exec. Order No. 10264, 16 Fed. Reg. 6417 (June 29, 1951) (delegating the President’s authority to the Secretary of the Interior). The Secretary of the Interior can even overturn the decisions of the High Court of American Samoa. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 384 (D.C. Cir. 1987).

⁴⁴ See, e.g., THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (“[R]efus[ing] to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature.”); ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 536 (Don. E. Fehrenbacher ed., 1988) (promoting “government of the people, by the people”). Further, the territories’ seemingly perpetual, inferior legal standing vis-à-vis the states also warps fundamental principles of federalism, diluting the Equality of States. See *Doctrine of the Equality of States*, JUSTIA, <https://law.justia.com/constitution/us/article-4/15-doctrine-of-the-equality-of-states.html> [<https://perma.cc/KU6R-JM2K>].

III. THE *INSULAR CASES* PERMIT THE UNITED STATES TO CEDE LAND

Traditionally, the *Insular Cases* provide that the Constitution applies fully in states and incorporated territories that enjoy an implicit promise of statehood, while only fundamental provisions apply in unincorporated territories.⁴⁵ Today, no scholar defends the *Insular Cases* as correctly decided; any defense is qualified by practical concerns about overturning a century-old system and precedent.⁴⁶ This Note takes a similar position. This Part examines the *Insular Cases*' current meaning and explores the possibility that they offer a "constitutional theory of secession,"⁴⁷ concluding they permit Congress to grant independence to unincorporated territories, which would otherwise be unconstitutional.

A. *The Insular Cases Remain Valid While Shifting to Protect Local Customs*

The framework created by the *Insular Cases* and their progeny give Congress plenary power to govern the territories with limited constitutional restraints.⁴⁸ Fortunately, Congress has granted many constitutional rights by statute, and the courts have found that some apply automatically.⁴⁹ Although the

⁴⁵ See Burnett, *supra* note 4, at 800.

⁴⁶ See Constitutional Law Amici Curiae Memorandum, *supra* note 19, at 18 (observing "no current scholar" has defended the *Insular Cases* from any "methodological perspective" (quoting Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1146 (2008))); Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1685 (2017) ("The foregoing critiques are persuasive, and this Note does not attempt to rationalize or defend the offensive origins and effects of the *Insular* doctrine. It does seek, however, to complicate the legacy of the cases.").

⁴⁷ See Burnett, *supra* note 4, at 802–03.

⁴⁸ See *infra* Part III.A.2. But see *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) ("The Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position . . . reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories . . . resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." (internal citations omitted)).

⁴⁹ See *Fitisemanu Summary Judgment Motion*, *supra* note 15, at 33–37; see, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016) (extending the Double Jeopardy Clause); *Boumediene*, 553 U.S. at 771 (extending the Suspension Clause); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 n.1 (1986) (extending the First Amendment); *Torres v. Puerto Rico*, 442 U.S. 465, 468–71 (1979) (extending the Fourth Amendment); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (extending the Equal Protection Clause); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668–69 n.5 (1974) (extending the Due Process Clause); *Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011) (extending the Contracts

Insular Cases' central holding has stood for nearly a century,⁵⁰ it is presently experiencing renewed attack and renovation. Some call for the *Insular Cases*' abrogation because their reasoning involves unconstitutional racial animus.⁵¹ However, a developing trend adopted by some courts instead reinterprets the cases to protect indigenous cultures and customs.⁵² The Supreme Court has yet to opine directly, but these recent lower court precedents, combined with *Boumediene*, suggest increasing support for the protective reinterpretation of the *Insular Cases*.

Clause); *Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1017 n.9 (1st Cir. 1989) (extending the Takings Clause). *But see Rabang v. I.N.S.*, 35 F.3d 1449, 1465 (9th Cir. 1994) (Pregerson, J., dissenting) ("The only constitutionally protected individual rights that the Supreme Court has found inapplicable to unincorporated territories are the rights to trial by jury and to a grand jury indictment.").

⁵⁰ See *Downes v. Bidwell*, 182 U.S. 244, 287–345 (1901) (White, J., concurring) (positing the doctrine of territorial incorporation); *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922) (unanimously affirming the doctrine of territorial incorporation).

⁵¹ See, e.g., *Downes*, 182 U.S. at 287 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them."); *Developments in the Law, American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1700–01 (2017) (finding the *Insular Cases* "serve to perpetuate and unequal and untenable status quo" creating a "regime of . . . political apartheid" derived from "intrinsically racist imperialism of a previous era of United States colonial expansionism" (internal quotations omitted)); Perez, *supra* note 24, at 1029 ("[T]he doctrine of territorial incorporation reasserts *Dred Scott*'s race-based approach to citizenship and should be overruled." (italics altered)).

⁵² See Laughlin, *Cultural Preservation*, *supra* note 8, at 344 (recognizing the "colonial mentality" that existed when the cases were decided, but seeking to appropriate them, making "the incorporation doctrine [] a basis for upholding local laws designed to protect indigenous people and their traditional culture"); see also *American Samoa and the Citizenship Clause*, *supra* note 51, at 1702 (observing "it appears that a significant part of the federal judiciary has now concluded, with Laughlin," that it is in the best interest of the judiciary to respect local cultures); Rennie, *supra* note 46, at 1686–87 (arguing such a judicial "accommodationist" policy is "defensible, perhaps even imperative" from a democratic perspective). *But see* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 908 (1990) (arguing formalists could conceive of the Constitution's stance on territories as "constitutionally mandated colonialism, which is not likely to go over well at cocktail parties," that devolved powers of self-government exercised by the territories is unconstitutional, which requires major changes in territorial governance or a constitutional amendment); Burnett, *supra* note 4, at 799 (arguing the *Insular Cases* permit the United States to "deannex" unincorporated territories).

1. *The Insular Cases under Current Law*

The entire doctrine of territorial incorporation derives from several cases,⁵³ but the two most important for this Note are *Downes v. Bidwell*⁵⁴ and *Balzac v. Porto Rico*. *Downes* considered the constitutionality of import duties on goods shipped from Puerto Rico to New York.⁵⁵ The otherwise-fractured Court held that Puerto Rico “is a territory appurtenant and belonging to the United States, but not a part of the United States,”⁵⁶ finding Puerto Rico separate, but in vague terms. Justice White concurred, articulating his theory of territorial incorporation based on international law and America’s previous history of expansion.⁵⁷ Two decades later, the *Balzac* Court unanimously adopted Justice White’s theory that newly acquired territories could be part of the United States internationally, but domestically separate and outside the scope of the Uniformity Clause.⁵⁸

Boumediene v. Bush,⁵⁹ the most recent Supreme Court case to discuss territorial incorporation, surveyed the doctrine’s history and development.⁶⁰ In the *Insular Cases*, the Court described its essential feature, the “doctrine of territorial incorporation” as one “under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.”⁶¹ While the contours of the doctrine shifted over time,⁶² its core principle that unincorporated territories are constitutionally separate from the United States remains.⁶³

The *Boumediene* Court found the *Downes* Court created territorial incorporation because it was “reluctant to risk” creating “uncertainty and instability” by displacing the existing civil law systems of the then-newly acquired territories.⁶⁴ While it did not address *Balzac*’s assertion that the territories were not a part of the United States, the Court recognized the U.S.

⁵³ See *Boumediene*, 553 U.S. at 756–57.

⁵⁴ *Downes*, 182 U.S. at 244–345.

⁵⁵ *Id.* at 247.

⁵⁶ *Id.* at 287.

⁵⁷ *Id.* at 287–345 (White, J., concurring).

⁵⁸ *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (“Porto Rico was [not a] territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it”); U.S. CONST. art. I, § 8.

⁵⁹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶⁰ *Id.* at 756–66.

⁶¹ *Id.* at 757.

⁶² See Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1–36 (2001).

⁶³ *Balzac*, 258 U.S. at 307–08 (holding that even the statutory extension of citizenship was insufficient to infer incorporation).

⁶⁴ *Boumediene*, 553 U.S. at 757 (citing *Downes v. Bidwell*, 182 U.S. 244, 282 (1901)).

Constitution operated in them with some “independent force”⁶⁵ and that even in 1922 the Court “took for granted” that “certain fundamental personal rights” existed in the territories, independent of Congress’s choice to extend them.⁶⁶ The Court further observed the importance of “particular circumstances,” “practical necessities,” Congress’s potential alternative options, and whether the judicial extension of a constitutional provision would be “impractical and anomalous.”⁶⁷ While the Court did not explicitly require consideration of the aforementioned concerns, it signaled their relevance.⁶⁸ The altered application of constitutional provisions in territories suggests citizenship rights may be different in unincorporated territories.

2. Recent Lower Court Decisions Favor Reinterpreting Territorial Incorporation to Protect Local Culture

In *Tuaua v. United States*, the D.C. Circuit determined Fourteenth Amendment birthright citizenship did not extend automatically to American Samoa because the imposition of citizenship would be impractical and anomalous.⁶⁹ *Tuaua* provides direct lower court precedent opposing the plaintiffs in *Fitisemanu*, as both cases advance essentially the same claim.⁷⁰ The court found the Citizenship Clause “textually ambiguous” regarding whether “in

⁶⁵ *Id.*

⁶⁶ *Id.* at 758 (quoting *Balzac*, 258 U.S. at 312).

⁶⁷ *Id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

In *Reid*, a plurality decision differed on the precise language, but the *Boumediene* Court observed the concurrence of Justice Harlan, who “was most explicit in rejecting a ‘rigid and abstract rule’ for determining where constitutional guarantees extend” and stressing the importance of “the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’” *Id.* at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (J. Kennedy, concurring) (citing the previous Harlan concurrence approvingly in reference to his impracticable and anomalous test for the applicability of constitutional provisions in the territories).

⁶⁸ See *supra* text accompanying note 67.

⁶⁹ *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015).

⁷⁰ Compare Complaint at 17, 20, 21, *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 1:12-cv-01143-RJL) (“The defendants refuse to recognize that persons born in American Samoa are U.S. citizens under the Citizenship Clause [of the Fourteenth Amendment] The State Department will not provide the individual plaintiffs with U.S. passports recognizing that they are U.S. citizens Defendant’s refusal to recognize the U.S. citizenship of the individual plaintiffs causes material harms.”) (formatting and capitalization altered), with *Fitisemanu* Complaint, *supra* note 9, at 8, 18 (“The Fourteenth Amendment’s Citizenship Clause makes all those born in the United States and subject to its jurisdiction citizens from birth. . . . The Defendants’ actions deprive American Samoans of equal dignity under the law and stigmatize them as second-class Americans.”) (formatting and capitalization altered).

the United States” applied to territories.⁷¹ Under such uncertainty, the court considered it “impractical and anomalous” to extend citizenship, especially when it would “override the democratic prerogatives of the American Samoan people,” whose representatives filed amici briefs opposing judicial extension.⁷² Interestingly, the court referenced *Boumediene*, acknowledging that ties between the United States and its unincorporated territories may strengthen in constitutionally significant ways,⁷³ hinting that the status quo will not endure forever. Since the Supreme Court denied certiorari, the scope of the Fourteenth Amendment’s citizenship guarantees and its application in unincorporated territories remain uncertain.⁷⁴

Tuaua has important similarities with the Ninth Circuit’s embrace of the revisionist approach in *Wabol v. Villacrusis*.⁷⁵ The case related to the Northern Mariana Islands (NMI), where the plaintiff sued to void a lease made in violation of the NMI Constitution’s restrictions against land alienation to non-indigenous people.⁷⁶ The court found the restrictions did not violate the U.S. Constitution’s Equal Protection Clause because, in this context, its application would be impracticable and anomalous.⁷⁷ The court noted the importance of the covenant that established American sovereignty, which explicitly protected NMI’s land alienation laws.⁷⁸ The court stated that “incorporation analysis thus must be

⁷¹ *Tuaua*, 788 F.3d at 302 (internal citations omitted).

⁷² *Id.* (internal citations omitted).

⁷³ *Id.* at 309 (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”) (quoting *Boumediene v. Bush*, 553 U.S. 723, 758 (2008)).

⁷⁴ See Christina Duffy Ponsa, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html> [<https://perma.cc/VUS5-AB3W>].

⁷⁵ See *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992).

⁷⁶ N. MAR. I. CONST. art. XII (restricting land ownership and long-term interests to “persons of Northern Marianas descent” defined as “a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof”). A full-blooded person of Northern Marianas descent is someone born or domiciled in the territory by 1950 and a citizen before the termination of the Pacific Trust Territory. *Id.* Their constitution also empowers the courts to determine Northern Marianas descent if disputed. *Id.*; *Wabol*, 958 F.2d at 1452.

⁷⁷ *Wabol*, 958 F.2d at 1460–61 (citing *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975)) (“[T]he particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress’s power to provide for the trial of Americans overseas.’ The importance of the constitutional right at stake makes it essential that a decision . . . rest on a solid understanding of [present conditions in the territory]. That understanding cannot be based on unsubstantiated opinion; it must be based on facts In short, the question is whether in [the territory] ‘circumstances are such that trial by jury would be impractical and anomalous.’” (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957))).

⁷⁸ *Wabol*, 958 F.2d at 1462; Covenant to Establish a Commonwealth of the N. Mar. I. in Political Union with the United States of America, N. Mar. I-U.S., Feb. 15, 1976, at art. V, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=3ae6b54e4> [<https://perma.cc/G899-BJ5H>] (explaining that the “applicability of certain provisions of the

undertaken with an eye toward preserving Congress's ability to accommodate the unique social and cultural conditions and values of the particular territory."⁷⁹ The *Wabot* court found the test satisfied because NMI's scarcity of land gave their restrictions a unique stabilizing social effect, promoted the preservation of local culture, and because its political union with the United States would not have occurred otherwise.⁸⁰ Further, the court dramatically stated: "The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures."⁸¹

In summation, the *Insular Cases* provide two important determinations for this Note. First, *Balzac*'s legal fiction separating unincorporated territories and the incorporated states and territories of the United States rests upon nearly a century of precedent. Second, they establish that the doctrine of territorial incorporation requires the explicit incorporation of territories by Congress for the Constitution to apply fully. That said, the doctrine has recently evolved to accommodate local cultures, the extent to which is not yet known.

B. *The Perpetual and Indestructible Union*

The legal fiction separating unincorporated territories from the United States and limiting the application of the Constitution makes territorial independence possible.⁸² *Texas v. White*,⁸³ read in conjunction with *Balzac*,⁸⁴ suggests becoming a part of the United States—incorporation into the Union—is permanent. *Texas v. White* discusses the United States as a perpetual union of

[U.S.] Constitution . . . will be without prejudice to the validity of and the power of [Congress] to consent to" the section of the Covenant establishing the racial restrictions on alienation).

⁷⁹ *Wabot*, 958 F.2d at 1460 ("In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense." (emphasis added)).

⁸⁰ *Id.* at 1461. Arguably, the same could be said of American Samoa.

⁸¹ *Id.* at 1462.

⁸² See Burnett, *supra* note 4, at 799.

⁸³ *Texas v. White*, 74 U.S. 700 (1868). Because of the important concurrence of Justice White in *Downes v. Bidwell*, I refer to *Texas v. White* throughout this Note by its full name to avoid any confusion between the two.

⁸⁴ It may appear misplaced to discuss a case related to the American Civil War in association with the unincorporated territories, but there are actually important similarities. See Burnett, *supra* note 4, at 802–03 n.15 ("[Amy Kaplan] offers an elegant reading of *Downes*. While she focuses less on the details of the different opinions, and more on the broader cultural connotations of the decision . . . she observes (rightly, in [Burnett's] view) that the language of the decision reflected lingering Civil War memories, and keenly notes the pervasive preoccupation with dismemberment of the national body." (internal quotation marks and citations omitted)).

states.⁸⁵ The case focuses on state-federal relations,⁸⁶ but its powerful language about the unity and indissolubility of the polity extends to the population. In conjunction with strong constitutional citizenship rights,⁸⁷ this suggests that, absent the *Insular Cases*' modification of constitutional requirements, the United States cannot sever its connection to incorporated territories if it would injure constitutionally protected citizenship.

Texas v. White resolved a dispute over the validity of bonds issued by the Confederate Texan government,⁸⁸ requiring the Court to determine if Texas legally remained a state of the Union during the Civil War.⁸⁹ The Court found unilateral secession unconstitutional so that, even in rebellion, Texas remained a state.⁹⁰ First looking to the Articles of Confederation, the Court observed: "[T]he Union was solemnly declared to be perpetual."⁹¹ Continuing, the Court found it "difficult to convey the idea of indissoluble unity more clearly"⁹² than with the Constitution's stated purpose "to form a more perfect Union."⁹³ According to *Texas v. White*: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."⁹⁴ Of Texas's annexation and admission into the Union, the Court said "she entered into an indissoluble relation":

The act which consummated [Texas's] admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.⁹⁵

⁸⁵ *Texas v. White*, 74 U.S. at 725.

⁸⁶ *Id.*

⁸⁷ *See infra* Part IV.B.

⁸⁸ *Texas v. White*, 74 U.S. at 718.

⁸⁹ *Id.* at 719.

⁹⁰ *Id.* at 726 (stating Texas's secession and all acts of its Confederate government "were absolutely null" and that the obligations and bonds of the Union "remained perfect and unimpaired").

⁹¹ *Id.* at 725; *see also* ARTICLES OF CONFEDERATION OF 1781, pmbl. (1777).

⁹² *Texas v. White*, 74 U.S. at 725.

⁹³ U.S. CONST., pmbl; *Texas v. White*, 74 U.S. at 725.

⁹⁴ *Texas v. White*, 74 U.S. at 725.

⁹⁵ *Id.* at 726. The use of "consent" as expressed above must refer to a constitutional amendment, since it seems absurd that a mere statute could undo an "indissoluble relation" with otherwise no "reconsideration or revocation." *See id.* Therefore, the reference to consent in *Texas v. White* affirms a rule against leaving the Union without the massive institutional support required for a constitutional amendment *and* a requirement that individual states leaving must consent—a rule against expulsion, or in alternate terms, against the *deannexation* of a state. *See* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal suffrage in the Senate.").

Unfortunately, because Texas was an independent nation before its annexation,⁹⁶ the case does not directly address whether the perpetual Union encompasses territories. Before the *Insular Cases*, but after *Texas v. White*, the Supreme Court described the territories as “but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states.”⁹⁷ Before the *Insular Cases*, precedent suggests incorporated territories were a part of the indissoluble union.⁹⁸

Balzac’s discussion of territorial incorporation appears to build on *Texas v. White*. Before *Balzac*, when territorial incorporation remained an uncertain doctrine, the Court expressed uncertainty whether Congress even possessed the power to cede America’s “newly acquired” territories.⁹⁹ When the *Balzac* Court adopted territorial incorporation unanimously, the refusal to recognize the incorporation of Puerto Rico *even after Puerto Ricans were given statutory citizenship* suggests incorporation is an act of profound gravity.¹⁰⁰ If *Texas v. White* renders “incorporation . . . final,”¹⁰¹ then the *Balzac* Court’s repeated statements that the Philippines and Puerto Rico had not been “incorporated [into] the Union or become a part of the United States,”¹⁰² suggest incorporation of a territory is permanent incorporation into the Union. From a policy perspective, this is consistent with the then-promised independence for the Philippines and the then-uncertain final status of Puerto Rico.

By the *Insular Cases*’ reasoning, all territories at the time of *Texas v. White* would have been considered incorporated and all citizens in territories at that time possessed constitutionally protected citizenship.¹⁰³ The *Texas v. White* Court articulates, albeit vaguely, a bond of mutual responsibility between the

⁹⁶ *The Annexation of Texas, the Mexican-American War, and the Treaty of Guadalupe Hidalgo, 1845–1848*, OFF. HISTORIAN: U.S. DEPT. ST. (Aug. 10, 2019), <https://history.state.gov/milestones/1830-1860/texas-annexation> [<https://perma.cc/J236-VUHR>].

⁹⁷ *Nat’l Bank v. Cty. of Yankton*, 101 U.S. 129, 133 (1878); *see also* Avelino J. Halagao, Jr., *Citizens Denied: A Critical Examination of the Rabang Decision Rejecting United States Citizenship Claims by Persons Born in the Philippines During the Territorial Period*, 5 UCLA ASIAN PAC. AM. L.J. 77, 87 (1998) (discussing importance of *Yankton*).

⁹⁸ *See* Burnett, *supra* note 4, at 819–20. However, Burnett, in her analysis of pre-*Insular Cases* territorial jurisprudence, observed that “precedents turn out to be more ambiguous” on the applicability of constitutional provisions “than one would expect . . . they reveal that the status of constitutional provisions in the territories ha[s] long been a source of confusion, and continued to be so up to 1901.” *See id.* at 819.

⁹⁹ *De Lima v. Bidwell*, 182 U.S. 1, 197 (1900) (speculating that “if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power,” the territory would become a foreign country); *id.* at 199 (“We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.”); Burnett, *supra* note 4, at 860–63.

¹⁰⁰ *See Balzac v. Porto Rico*, 258 U.S. 298, 305–06 (1922).

¹⁰¹ *Texas v. White*, 74 U.S. 700, 726 (1868).

¹⁰² *Balzac*, 258 U.S. at 305.

¹⁰³ *See, e.g., id.*

federal government and citizens that is of significance.¹⁰⁴ The Court discussed how rebellion altered the obligations of the federal government, the states, and the citizens, observing “[o]bligations often remain unimpaired, while relations are greatly changed.”¹⁰⁵ The Court observed it was the duty of the federal government to restore a constitutionally legitimate government in Texas and to ensure the just-freed slaves would be guaranteed participation in the new government.¹⁰⁶ The Court contemplated a federal responsibility to protect individuals’ exercise of citizenship.¹⁰⁷ Considering this ruling occurred just after the adoption of the Fourteenth Amendment, well before the incorporation of most constitutional protections, the now-heightened constitutional guarantee directly to individuals should only expand the federal government’s duty to citizens.

The *Insular Cases* and their subsequent interpretation hold the Constitution does not apply the same in the unincorporated territories as it does “in” the United States.¹⁰⁸ The Constitution operates to the extent it guarantees fundamental rights, but likely does not protect a right that would be impractical or anomalous in a specific territorial context.¹⁰⁹ Recent decisions invoking the *Insular Cases* suggest their reach should not expand and that, over time, changes of constitutional significance may occur.¹¹⁰ It seems that the territorial incorporation doctrine, resting on a century of precedent—even if steeped in folly—may continue to exist, albeit with lessened vigor. The comment about constitutional significance suggests a warning for the legislature (and ultimately territorial citizens as well) that territories could someday become de facto incorporated, in direct contravention of *Balzac*.¹¹¹ Perhaps the Supreme Court would even use *Balzac* to overturn itself by finding a century of congressional inaction serves as de facto incorporation, as *Balzac* did speak about the territories with an eye to their newly acquired and uncertain future statuses.¹¹² When read in conjunction with *Texas v. White*, the *Insular Cases* suggest incorporation is the threshold for entry into the United States. Should the *Insular Cases* be overturned, the territories would become a part of the perpetual and indissoluble Union.

¹⁰⁴ *Texas v. White*, 74 U.S. at 727.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 728–29.

¹⁰⁷ *See id.* at 726–28.

¹⁰⁸ *Boumediene v. Bush*, 553 U.S. 723, 757–58 (2008).

¹⁰⁹ *See id.* at 758.

¹¹⁰ *See id.* (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”); *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting *Boumediene*, 553 U.S. at 758).

¹¹¹ *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922).

¹¹² *See id.* at 306.

IV. THE PECULIAR STATUS OF TERRITORIAL CITIZENSHIP

At the heart of *Fitisemanu* is the question of citizenship.¹¹³ The plaintiffs argue that regardless of the *Insular Cases*, the common law doctrine of *jus soli* guarantees Fourteenth Amendment citizenship to the populations of United States territories because the right is associated with American sovereignty rather than being legally *in* the United States.¹¹⁴ *Fitisemanu* only seeks extension to American Samoa,¹¹⁵ but if granted, birthright citizenship should logically extend to all territories. This Part discusses the *jus soli* argument and explores the difference between constitutional citizenship and statutory citizenship, concluding that the greater protections of constitutional citizenship could prevent a territory from seeking independence.

A. The Jus Soli Argument

The plaintiffs in *Fitisemanu* and *Tuaua* and some scholars contend the common law doctrine of *jus soli* extends Fourteenth Amendment citizenship to all U.S. territories regardless of their incorporation status.¹¹⁶ The doctrine of *jus soli* is derived from the English common law, which determined those born “within the King’s domain” and “within the obedience or ligeance of the King” were subjects or, as we would say today, citizens.¹¹⁷ While the Supreme Court has previously rejected the argument,¹¹⁸ a broad interpretation of *jus soli* contends the Fourteenth Amendment was meant to codify the traditional common law understanding of *jus soli*, as expressed in *United States v. Wong*

¹¹³ See discussion *supra* Part I.

¹¹⁴ *Fitisemanu* Complaint, *supra* note 9, at 8–9; U.S. CONST. amend. XIV, § 1.

¹¹⁵ *Fitisemanu* Complaint, *supra* note 9, at 34.

¹¹⁶ *Fitisemanu* Summary Judgment Motion, *supra* note 15, at 26–27, 32; Reply Brief of Plaintiffs-Appellants at 11–19, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272); see also Brief of Citizenship Scholars as Amici Curiae Supporting Plaintiffs at 2–14, *Fitisemanu v. United States*, 1:18-cv-00036, 2018 WL 6068535 (D. Utah Apr. 24, 2018) (arguing for a broad interpretation of the Fourteenth Amendment’s *jus soli* birthright citizenship right); Perez, *supra* note 24, at 1055 (arguing “in the United States” should be interpreted according to the traditional common law understanding of *jus soli*, which would include unincorporated territories).

¹¹⁷ See *Tuaua v. United States*, 788 F.3d 300, 304–05 (D.C. Cir. 2015) (discussing and rejecting plaintiff’s *jus soli* argument: “[E]ven assuming the framers intended the Citizenship Clause to constitutionally codify *jus soli* principles, birthright citizenship does not simply follow the flag.” (internal citations omitted)); Perez, *supra* note 24, at 1046–53 (discussing *Calvin’s Case* and the common law history of *jus soli* in detail).

¹¹⁸ Brief for Appellees at 26, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) (“In fact, Plaintiffs’ and amici’s reliance on an overextension of the principle of *jus soli* and English common law has already been directly rejected by the Supreme Court in *Rogers* where the Court stated: We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.”) (emphasis and quotation marks omitted, formatting altered) (citing *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)).

Kim Ark.¹¹⁹ Proponents of this interpretation contend the *Insular Cases* wrongly failed to apply the *jus soli* doctrine in unincorporated territories.¹²⁰ Simply, the *jus soli* argument asserts that the citizens of unincorporated territories are entitled to constitutional Fourteenth Amendment birthright citizenship because of their allegiance to the United States.¹²¹ Some contend the territorial incorporation doctrine must be repealed to achieve this end,¹²² however, the *Fitisemanu* plaintiffs argue the doctrine poses no obstacle.¹²³

B. Constitutional Versus Statutory Citizenship

The Supreme Court affords tremendous protection to constitutional citizenship. In *Afroyim v. Rusk*, the Court made its fundamental analysis of the Fourteenth Amendment's Citizenship Clause.¹²⁴ *Afroyim* challenged the Nationality Act of 1940, which automatically revoked the citizenship of any

¹¹⁹ *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). The Court in *Wong Kim Ark* concluded that:

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in *Calvin's Case* . . . strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject.

Id. (internal quotations omitted).

¹²⁰ Perez, *supra* note 24, at 1055–60.

¹²¹ Similarly, one could assert it is because the people of the territories are subject to U.S. sovereignty. The deeper point is that the Citizenship Clause should apply to states, incorporated territories, and unincorporated territories alike.

¹²² Perez, *supra* note 24, at 1057, 1081 (arguing the *Downes* Court “took advantage of the unique political and geographical circumstances of the insular territories in order to retroactively reinterpret the rule of *jus soli*,” and concluding “it is doubtful that the Court will be able to properly correct the scope of the Citizenship Clause without overruling the doctrine of incorporation”).

¹²³ *Fitisemanu* Summary Judgment Motion, *supra* note 15, at 33–37 (“In all events, the *Insular Cases* themselves support the proposition that American Samoans owe allegiance to the United States and are thus granted birthright Citizenship by the Fourteenth Amendment’s codification of the [common law] *jus soli* rule.”).

¹²⁴ *Afroyim v. Rusk*, 387 U.S. 253, 254 (1967).

American who voluntarily voted in a foreign election.¹²⁵ The Court found the Fourteenth Amendment protects each citizen from the “forcible destruction” of their citizenship and recognized a “constitutional right to remain a citizen in a free country unless [] voluntarily relinquishe[d].”¹²⁶ In the past, Congress could revoke citizenship in such a way under the “ample scope” of its implied power to regulate foreign affairs.¹²⁷

Afroyim largely controls the field on citizenship, but not entirely.¹²⁸ There is a serious, although little-discussed, debate over Congress’s ability to revoke Puerto Ricans’ citizenship.¹²⁹ Because the Fourteenth Amendment’s Citizenship Clause does not extend to Puerto Rico, its people’s citizenship is guaranteed *only* by statute and is revocable.¹³⁰ Some dismiss the problem,¹³¹ but because the subject is not commonly discussed, a Note by Lisa Maria Perez offers the best analysis. Perez contends that while *Afroyim* suggests Congress cannot take citizenship without consent, *Rogers v. Bellei* limited that holding.¹³² The *Bellei* Court held *Afroyim* related to citizenship acquired under the Fourteenth Amendment, explicitly referencing being “born *in*” the United States,¹³³ and refused to judicially extend those protections to statutory citizens for a dual citizen born abroad who inherited his citizenship.¹³⁴ *Bellei* raises a

¹²⁵ *Id.*

¹²⁶ *Id.* at 268.

¹²⁷ *Perez v. Brownell*, 356 U.S. 44, 57–60 (1958).

¹²⁸ *See* Tuaua v. United States, 788 F.3d 300, 307 (2015) (recognizing the importance of *Afroyim* and other cases as supporting that citizenship is a fundamental right in the non-territorial context).

¹²⁹ *Perez*, *supra* note 24, at 1032 (noting the “inferior citizenship status of Puerto Ricans . . . reveals a grave inconsistency in the Supreme Court’s Fourteenth Amendment jurisprudence”). While much of the discussion focuses on Puerto Rico, there is no reason this would not apply similarly in the other territories, as they all possess the same constitutional status. *See infra* note 136. Perhaps the Northern Mariana Islands would be an exception due to their unique history. *See supra* text accompanying note 76. Puerto Rico is most discussed, but the legal principles underlying the debate would apply to all territories.

¹³⁰ *Perez*, *supra* note 24, at 1029.

¹³¹ *See, e.g.,* Joseph Blocher & Mitu Gulati, *What Does Puerto Rican Citizenship Mean for Puerto Rico’s Legal Status?*, 67 DUKE L.J. ONLINE 122, 127 (2018); Edwin Melendez, *Puerto Rican U.S. Citizenship Is Permanent and Irreversible*, CTR. FOR PUERTO RICAN STUD. (Apr. 16, 2017), <https://centopr.hunter.cuny.edu/events-news/puerto-rico-news/Citizenship/puerto-rican-us-citizenship-permanent-and-irreversible> [<https://perma.cc/A5SE-J37F>].

¹³² *Perez*, *supra* note 24, at 1032–34, 1069–73 (concluding the doctrine of territorial incorporation, as currently understood, permits the revocation of Puerto Rican citizenship). *But see* Blocher & Gulati, *supra* note 131, at 129–30 (arguing equal protection or some other collateral right should prevent wanton revocation).

¹³³ *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (emphasis added).

¹³⁴ *Id.* (“But, as pointed out above, [*Afroyim*’s holding on citizenship protections] were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment’s direct reference to ‘persons born or naturalized in the United States.’ We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute.”); *see also* *Perez*, *supra* note

serious question about the durability of people born in the territories' citizenship.¹³⁵

The people of Puerto Rico, and the other territories,¹³⁶ are arguably not guaranteed the Fourteenth Amendment citizenship protections of *Afroyim* and can have their American citizenship revoked.¹³⁷ The extension of constitutional citizenship would be necessary to gain *Afroyim*'s extensive protections. *Afroyim* and the *Insular Cases*, read together, raise a question as to how *Afroyim*'s protections are modified by the revisionist interpretation of the *Insular Cases*. How the Court would strike that balance is unclear, but it would likely create substantial limitations on any territory's ambition for independence.

V. THE RIGHT TO CITIZENSHIP BINDS THE UNION

Likely the result of *Tuaua*, the non-citizen status of American Samoans has been a popular topic in recent scholarship.¹³⁸ Tracking *Tuaua*, the discussions focus on the Fourteenth Amendment's guarantee that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are

24, at 1068–71 (describing *Bellei* as holding that "the statutory citizenship of persons born abroad to U.S. citizen parents is not fundamentally irrevocable and may be conditioned by Congress").

¹³⁵ *Bellei*, 401 U.S. at 835; Perez, *supra* note 24, at 1071; *see also* Christina Duffy Burnett, "They Say I Am Not an American . . .": *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 714 (2008) (concluding the constitutional durability of Puerto Rican citizenship remains questionable).

¹³⁶ Puerto Ricans and other citizens from the territories are guaranteed citizenship by statute, similarly to the plaintiff in *Bellei*. *See* 8 U.S.C. § 1402 (2012) (covering Puerto Rico); 8 U.S.C. § 1406 (2012) (covering United States Virgin Islands); 8 U.S.C. § 1407 (2012) (covering Guam); 48 U.S.C. § 1801(301) (2012) (covering the Commonwealth of the Northern Marshall Islands); 8 U.S.C. § 1408(1) (2012) (covering American Samoa).

¹³⁷ Perez, *supra* note 24, at 1029–35. *But see* Blocher & Gulati, *supra* note 131, at 129–30 (arguing equal protection or some other collateral right should prevent wanton revocation). It is also impossible to seek judicial protection of one's statutory citizenship. Perez discusses the case of *Efron ex rel. Efron v. United States*, where the Florida District Court dismissed the plaintiff, a Puerto Rican, who sued to have her statutory citizenship recognized as constitutional. Perez, *supra* note 24, at 1031–32; *Efron ex rel. Efron v. United States*, 1 F. Supp. 2d 1468, 1469 (S.D. Fla. 1998).

¹³⁸ *See generally* Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71 (2013); Benjamin E. Mannion, Note, "A People Distinct from Others": *Service, Sacrifice, and Extending Naturalized Citizenship to American Samoans*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 477 (2018); Benjamin Wallace Mendelson, Note, *Courts Have Gone Off the Map: The Geographic Scope of the Citizenship Clause*, 95 TEX. L. REV. 873 (2017); Ivy Yeung, Note, *The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?*, 17 ASIAN-PAC. L. & POL'Y J. 1 (2016); Benjamin S. Morrell, Note, *Some More for Samoa: The Case for Citizenship Uniformity*, 9 TENN. J.L. & POL'Y 475 (2014); Perez, *supra* note 24, at 1029.

citizens of the United States.”¹³⁹ These discussions generally propose methods for maneuvering around *Tuaua* and advocate the *Insular Cases*’ abrogation.¹⁴⁰ The implications of *Fitisemanu*’s assertion that Fourteenth Amendment citizenship can apply to the unincorporated territories within the *Insular Cases* framework are largely unconsidered, particularly the consequences if any territory ultimately determines it desires independence.¹⁴¹

Should the argument that American Samoans are entitled to constitutional citizenship as a result of *jus soli* prevail, it will breathe life into a right to remain under United States sovereignty, permanently binding the current unincorporated territories to the Union.¹⁴² Some may argue this is not a problem, but it would prevent the possibility of Puerto Rico, or any other territory from being granted—or made—independent from the United States, which would remove that option as a possible solution to the problem of the democratic deficit in the American territories.¹⁴³ Further, any local cultural practices in a territory unable to withstand constitutional scrutiny would likely not be able to be protected.¹⁴⁴

Two scenarios are possible, but with profound differences in effect. The first, the Part V.A scenario, would overturn the *Insular Cases* and abrogate territorial incorporation to extend Fourteenth Amendment citizenship to American Samoa because the court finds that necessary in order to find the territory “in the United States” for the purpose of the Citizenship Clause.¹⁴⁵ This is less likely, as it would be a dramatic change in law, but is not impossible given the previous discussion of the possibility that “ties between the United States and any of its unincorporated territories [may] strengthen in ways that are of constitutional significance;”¹⁴⁶ a century of inaction could be significant. The second, the Part V.B scenario, would find no conflict between the *Insular Cases*

¹³⁹ U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁴⁰ See, e.g., *Fitisemanu* Summary Judgment Motion, *supra* note 15, at 32; Morrison, *supra* note 138, at 145–50; Neil Weare, *Citizenship in U.S. Territories: Constitutional Rights or Congressional Privilege?*, 29 *CENTRO J.* 136, 139 (2017); Mannion, *supra* note 138, at 512; Mendelson, *supra* note 138, at 885–88; Morrell, *supra* note 138, at 484–87.

¹⁴¹ Perez, *supra* note 24, at 1053–57 (arguing a *jus soli* argument for Fourteenth Amendment citizenship in Puerto Rico bearing substantial similarity to the argument made by the *Fitisemanu* plaintiffs); see also Blocher & Gulati, *supra* note 131, at 127 (“There is no conceptual need for citizenship and territorial status to rise or fall together. It is easy enough to imagine American citizens living on non-state or even non-American soil. That’s what expatriates do. Nor is it inconceivable to imagine the creation of a new state whose residents would not immediately and automatically become citizens.”).

¹⁴² Arguably such a right would, then, have always existed, minimally since the passage of the Fourteenth Amendment. However, it remains untested, as Congress has never ceded an incorporated territory before.

¹⁴³ See *infra* Part V.A.

¹⁴⁴ See *infra* text accompanying note 154.

¹⁴⁵ U.S. CONST. amend. XIV.

¹⁴⁶ *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

and Fourteenth Amendment birthright citizenship while still preserving the legal fiction separating the unincorporated territories from the Union. Such a scenario seems most plausible if the court is inclined to grant *Fitisemanu* relief. Retaining the *Insular Cases* while extending birthright citizenship maneuvers facially around precedent, despite functionally making a major change.

A. Resolving Fitisemanu to Abrogate the Insular Cases and Extend Fourteenth Amendment Birthright Citizenship

Should the Supreme Court eventually extend birthright citizenship and determine it necessary to abrogate the *Insular Cases* and territorial incorporation to find American Samoa is “in the United States” for purposes of the Citizenship Clause, it is unclear what would then transpire. At present, the *Insular Cases* require U.S. territories be explicitly incorporated by Congress to be considered in the United States and are otherwise separate from the Union of states and incorporated territories.¹⁴⁷ Relatedly, *Texas v. White* determined that the Union is perpetual and indestructible.¹⁴⁸ That said, the doctrine has recently shifted slightly in order to accommodate local cultures, the extent to which is not yet known.¹⁴⁹ It is possible such a ruling could be specifically tailored to American Samoa for some reason, despite the straightforward logic that without the exception to the Uniformity Clause created by the *Insular Cases*, birthright citizenship would apply uniformly.¹⁵⁰

Abrogating the *Insular Cases* would immediately incorporate every territory.¹⁵¹ Once incorporated, they would likely be part of the perpetual, indestructible Union.¹⁵² Every territory would be fully incorporated and populated by American citizens sure of that status but trapped in their current status limbo, without the option to pursue temporary or permanent independence.¹⁵³ Additionally, local customs and race-restrictive laws generally

¹⁴⁷ See discussion *supra* Part III.A.

¹⁴⁸ See discussion *supra* Part III.B.

¹⁴⁹ See discussion *supra* Part III.A.2.

¹⁵⁰ See Constitutional Law Amici Curiae Memorandum, *supra* note 19, at 14. Arguably, American Samoa is itself a poor candidate for judicially imposed citizenship, given the concerns of some that a greater application of the Constitution might threaten local customs. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 309–10 (2015) (discussing the “probable danger citizenship poses to American Samoa’s customs and cultural mores”). If this case were focused on another territory, there would at least be a weak policy argument against the uniform application of birthright citizenship.

¹⁵¹ See *supra* Part III.B.

¹⁵² See *id.*

¹⁵³ See generally Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U. L. REV. 429 (2011) [hereinafter Laughlin, *Colonialism or Reasonable*] (discussing the positive and negative aspects of independence, arguing the choice to remain affiliated with the United States should not be disregarded and warning the courts to be careful when applying rights in territories to respect local customs).

thought to preserve local cultures would likely be in legal jeopardy,¹⁵⁴ which could see the attempted remedy of an old injustice inflict new ones. Under this scenario, Puerto Rico could still accede to statehood someday. With independence unavailable, the Puerto Rican people might unite in demanding statehood and finally force Congress's hand. Other, much smaller,¹⁵⁵ territories would have to remain in their current statuses, be annexed by an existing state, or require a constitutional amendment providing real representation in the federal government.¹⁵⁶

B. Resolving Fitisemanu to Preserve the Insular Cases and Extend Fourteenth Amendment Birthright Citizenship

A Supreme Court decision extending Fourteenth Amendment citizenship to American Samoa consistent with the *Insular Cases* is more likely than overturning territorial incorporation if the Court is inclined to change the law.¹⁵⁷ The Court could extend Fourteenth Amendment citizenship under the recent reinterpretation of the *Insular Cases*, which accounts for particular circumstances and protection of local customs.¹⁵⁸ The Court could also follow the argument of the *Fitisemanu* amici scholars, that the *Insular Cases* should be read narrowly to permit the extension of birthright citizenship based on a distinction between being “throughout the United States” under the Uniformity Clause and “in the United States” under the Fourteenth Amendment.¹⁵⁹ The Court could find constitutional significance in Congress's failure to address the status of the territories for nearly a century and conclude that it has finally metastasized into a de facto desire to retain them with enough permanence that their people should, at birth, be considered citizens. The degree to which the Court relied on a *jus soli* line of reasoning could alter the shape of the decision

¹⁵⁴ See Laughlin, *Cultural Preservation*, *supra* note 8, at 331, 341. But see Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 739, 768–69 (1995) (challenging idea that racial restrictions on land alienation should be protected, arguing they are unconstitutional).

¹⁵⁵ See *infra* text accompanying note 185 (comparing the populations of Wyoming, Washington, D.C., and each territory).

¹⁵⁶ The territories all currently have non-voting delegates in the House. See *Legislative Interests in the Territories*, U.S.H.R. HIST. ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Strength-Numbers/Legislative-Territories/> [<https://perma.cc/792E-5NTX>] (discussing the role of territorial delegates). Such a proposal would also be uncomfortable regarding American principles of equal representation, because if the territories could not be states, then what essentially lesser representation should they be entitled to—one voting representative but no Senator? See Laughlin, *Colonialism or Reasonable*, *supra* note 153, at 431–36. It becomes an ugly discussion that could ultimately answer one wrong with another.

¹⁵⁷ See *supra* Part V.A.

¹⁵⁸ See *supra* text accompanying notes 8, 54.

¹⁵⁹ Constitutional Law Amici Curiae Memorandum, *supra* note 19, at 10–15.

as well.¹⁶⁰ Similarly, as above, such a ruling would ultimately affect all the territories uniformly.¹⁶¹

The result of this decision would be more interesting. Retaining the *Insular Cases* would likely mean the Citizenship Clause, even if applying of its own force, would remain subject to the “impracticable and anomalous”¹⁶² test and guarantees of “fundamental personal rights” in the territories.¹⁶³ *Afroyim* stated that “[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.”¹⁶⁴ Without the impractical and anomalous test, the *Afroyim* right to constitutional citizenship could very well prevent Congress from granting independence. However, the concern for the “particular circumstances” and “possible alternatives which Congress ha[s] before it” under such a circumstance could render it “impracticable and anomalous” to prevent Congress from minorly diluting citizenship rights to affirm a popular consensus in favor of independence.¹⁶⁵ One scholar asserted a right to self-determination existed in the Constitution.¹⁶⁶ Under a standard that treats territories specifically and guarantees fundamental rights, it seems possible that a locally advanced and democratically determined movement for self-determination could constitutionally permit a qualified form of independence.¹⁶⁷

C. Resolving *Fitisemanu Properly*

The *Insular Cases* may be the exemplar for *stare decisis*—they are wrongly decided but should be retained. The *Fitisemanu* Court should rule that the *Insular Cases* and territorial incorporation control. The effort to distinguish the Fourteenth Amendment from the Incorporation Doctrine is interesting, but the judicial extension of citizenship seems difficult to justify without massively undermining territorial incorporation. The doctrine and the *Insular Cases* sit upon more than a century of precedent, and their essential holdings were reaffirmed by the Supreme Court as recently as 2008 in *Boumediene* and by the

¹⁶⁰ See discussion *supra* Part IV.A.

¹⁶¹ But see *supra* text accompanying note 137. *Efron* suggests a claim might only ever be able to be made if Congress attempted to revoke a territorial population’s citizenship status, or if Congress attempted to grant independence to a territory.

¹⁶² *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957)).

¹⁶³ *Id.* at 758 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

¹⁶⁴ *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967) (emphasis added).

¹⁶⁵ *Boumediene*, 553 U.S. at 759. Arguably, this could also serve to protect local customs and laws perpetuating indigenous ownership of land in American Samoa and the Northern Mariana Islands; the crucial factors would be the validity of the impractical and anomalous standard and that it be applied consistently with previous cases. Laughlin, *Cultural Preservation*, *supra* note 8, at 352–53.

¹⁶⁶ Javier J. Rúa Jovet, *The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism*, 49 REV. DER. P.R. 163, 209–13 (2010).

¹⁶⁷ See *infra* Part VI.B.

D.C. Circuit in 2015 in *Tuaua*.¹⁶⁸ The American system of territorial law and government, with its serious constitutional and normative democratic flaws, is reliant on the *Insular Cases*' determinations.¹⁶⁹ To disturb them would throw the lives of millions into uncertainty.¹⁷⁰

Further, there is a real possibility that greater constitutional integration would threaten laws protecting indigenous land and ownership and ancient customs, which, given the wrong such litigation seeks to right, is particularly concerning.¹⁷¹ The reasoning behind the *Insular Cases*, both past and present, is heavily infected with policy considerations but, ironically, striking them down would make a profound policy choice against independence for any territory. The cases are flawed and have caused their share of harm,¹⁷² but the real blame should lie with Congress, which has contributed more to this democratic deficit and all the evils it entails than any other decision or institution. The collective failure of the legislature to act on behalf of the people of the territories is likely to transcend and eclipse any "victory" in court.

VI. NO EASY ANSWERS

At present, any resolution to the territories' status and representative challenges discussed above is possible. If independence is preferred, the process could proceed in numerous forms and should involve close communication with and deference to the citizens of the specific territory. However, it is entirely possible that the territories would reject independence. In American Samoa there is a strong desire to *remain* with the United States:¹⁷³ majorities favored

¹⁶⁸ *Boumediene*, 553 U.S. at 726; *Tuaua v. United States*, 788 F.3d 300, 306–07 (2015). *But see* *Aurelius Inv. v. Puerto Rico*, 915 F.3d 838, 854–55 (1st Cir. 2019) (describing the lineage of the *Insular Cases* as "discredited" and concluding they do not control in an analysis of the Appointments Clause).

¹⁶⁹ *See supra* note 48.

¹⁷⁰ *See infra* text accompanying note 185 (estimating the population sizes of U.S. territories).

¹⁷¹ *See* Laughlin, *Cultural Preservation*, *supra* note 8, at 375 (describing the importance of preserving cultural choices for locals and asking if it can be conceivably "in anyone's interest for mainland judges to tell the U.S. islands that they must abandon those cultures?"); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 801–02 (2008) (questioning whether certain laws based on indigenous ancestry would withstand full constitutional scrutiny); Weaver, *supra* note 8, at 367 (discussing how the United States' administration of American Samoa has generally guarded Samoan traditional customs, the "fa'a Samoa," but is beginning to harm the rights of some residents).

¹⁷² *See supra* text accompanying note 51.

¹⁷³ *See* FUTURE POLITICAL STATUS STUDY COMM. OF AM. SAM., *supra* note 8, at 42–43 (finding "[t]he Samoan public, from leaders to the rank and file, both on and off-island, overwhelming [sic] emphasized two major points: (a) American Samoa must remain part of the American family of states and territories; (b) be certain that a chosen status will not adversely affect customs and culture, and the perpetuation of the Samoan language," and recommending American Samoa continue in its current status, but initiate negotiations with

statehood in recent Puerto Rican non-binding referenda,¹⁷⁴ no major party in the U.S. Virgin Islands advocates independence,¹⁷⁵ and Guam has an active movement challenging its current status.¹⁷⁶ The Court's decision in *Fitisemanu*

Congress for a permanent status); U.N., Caribbean Reg'l Seminar on Third Int'l Decade for the Eradication of Colonialism, Statement Submitted by Mr. Daniel Aga of Am. Sam., U.N. Doc. CRS/2017/CRP.5/Rev.1 (2017), https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/2017_5_nsgt_american_samoa.pdf [<https://perma.cc/T2KY-2P6E>] ("Given our present government and way of life, do we, in American Samoa, live under a regime for which colonization must be eradicated? Do we consider ourselves a colonized people? The answer to both questions is No. We do not. Is there is a widespread yearning for political independence? No. There is not." (internal quotation marks omitted) (original emphasis omitted)).

¹⁷⁴R. SAM GARRETT, CONG. RESEARCH SERV., PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 1, 8 (June 2013), <https://fas.org/sgp/crs/row/R42765.pdf> [<https://perma.cc/9ERB-VDNB>] (observing in a 2012 status referendum that "when asked if Puerto Rico should retain its current status, 53.97% answered no; 46.03% answered yes," and "when asked to select among the three listed status options, 61.16% chose statehood; 33.34% chose sovereign free associated state, and 5.49% chose independence") (internal quotations omitted). The most recent referendum in 2017 suffered numerous problems, casting doubt on the value of its results. See Frances Robles, 23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html> [<https://perma.cc/WU2G-PY8Z>] (discussing the status debate, low turnout, and how the pro-statehood government advanced the referendum while the Department of Justice requested a delay and the opposition party called for a boycott).

¹⁷⁵See Enrice Gilbert, *U.S.V.I. Could Remain with U.S. or Seek Independence; U.S. Gov't Says*, V.I. CONSORTIUM (Apr. 3, 2016), <https://viconsortium.com/breaking-news/u-s-v-i-could-remain-with-u-s-or-seek-independence-u-s-govt-says/> [<https://perma.cc/7HF2-RNKL>] (covering St. Croix speech by the Obama-era Secretary of the Interior, where a promise that U.S.V.I. could choose independence was "received with silence," about which U.S.V.I. Senate President later said, "I just want to be an American"); April Knight, *'Homegrown' Independent Citizens Movement Celebrates 50 Years*, ST. JOHN SOURCE (Oct. 22, 2018), <https://stjohnsource.com/2018/10/22/homegrown-independent-citizens-movement-celebrates-50-years/> [<https://perma.cc/L6AM-UJYS>] (noting that while Democrats "dominate" the political landscape and the Republicans are insignificant, the Independent Citizens Movement, a longstanding third-party, advocates "self-determination" and modification of U.S.V.I.'s current status without full separation from the United States, although with greater leeway to maintain personal and commercial relationships with nearby Caribbean countries; however, the party considers education their top priority); Senator Neville James, 33RD LEGISLATURE V.I., <http://www.legvi.org/senators/st-croix/senator-neville-james/> [<https://perma.cc/TJB7-9PXH>] (showing that the U.S.V.I. Senate President represents the Democratic party).

¹⁷⁶*Davis v. Guam*, 932 F.3d 822, 824–33 (9th Cir. 2019) (finding the nonbinding Guam future status plebiscite's restriction of voting to "Native Inhabitants of Guam" constitutes a proxy for race, making it an impermissible racial restriction on 15th Amendment voting rights); Steve Limtiaco, *Court: Political Status Vote Is Illegally Race-Based*, PAC. DAILY NEWS (July 30, 2019), <https://www.guampdn.com/story/news/2019/07/29/federal-court-political-status-vote-illegally-race-based/1863474001/> [<https://perma.cc/DTN6-TGKU>] (discussing the ongoing status debate, and the intentions of the government and activists to continue seeking a change to Guam's current political status); Clynt Ridgell,

could have a decisive impact on this debate by limiting Congress's ability to advance territorial self-government by narrowing the options of what can be done, absent a constitutional amendment.

A ruling that overturns the *Insular Cases* to extend Fourteenth Amendment birthright citizenship to American Samoa should extend that guarantee to all territorial citizens and bind the territories to the United States permanently.¹⁷⁷ A similar ruling that *does not* overturn the *Insular Cases* would prevent unqualified independence but would preserve the possibility of free association.¹⁷⁸ An ideal resolution of the territorial question would balance a plan's constitutional legality, the desires of the people of the territory in question, and American commitments to self-government under both normative values and international treaties. Each of these factors is in tension and may not all be possible to satisfy. Present circumstances, however, offend them all. Criticism of the *Insular Cases* is legally compelling, but a potential policy disaster. The legal status quo gives Congress discretion to craft solutions carefully tailored for each territory.¹⁷⁹ This should not be disregarded.

At present, Congress has substantial power to address the problems with the status of the territories,¹⁸⁰ including to grant full independence to any territory, qualified independence with a treaty of free association, as well as a more traditional route of incorporation and eventual statehood.¹⁸¹ If the *Insular Cases* are abrogated, then the territories would be automatically incorporated, and only statehood, incorporation into a state, or a continuation of the status quo remain as options. If the *Insular Cases* remain untouched, but Fourteenth Amendment

What Is Decolonization, Self-Determination, and a Plebiscite? [sic], PAC. NEWS CTR. (May 2, 2018), <https://pncguam.com/what-is-decolonization-self-determination-and-a-plebiscite/> [<https://perma.cc/3XJE-V3NL>] (discussing the background of the status debate, how gubernatorial candidates are opining on the issue, and the three considered statuses of free association, independence, and statehood).

¹⁷⁷ See *supra* Part V.A.

¹⁷⁸ See *supra* Part V.B.

¹⁷⁹ See *supra* Part III.A; see also *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (suggesting Congress possesses substantial leeway in legislating to give greater autonomy to the territories, specifically Puerto Rico).

¹⁸⁰ See *Sanchez Valle*, 136 S. Ct. at 1876.

¹⁸¹ See Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 269 (2018) (arguing from a mixed U.S. constitutional and international law perspective that the U.S. Territories have a right to choose to remain under American sovereignty or gain independence); Jovet, *supra* note 166, at 164–65, 215–17 (offering no specific solution, but arguing “[t]he fact is that, not only internationally, but also federally, most ends are possible, when there is sufficient *political will*,” and finding that a closer relationship than free association is possible); Laughlin, *Colonialism or Reasonable*, *supra* note 153, at 440–41 (suggesting Congress will have to propose a constitutional amendment to “create a more fundamentally sound charter for territorial self-government”); Peralta, *supra* note 27, at 256 (asserting a future for the territories “cannot include [a] territorial regime,” the source of their problems); Perez, *supra* note 24, at 1080–81 (concluding it is “doubtful” the Court can “properly correct the scope of the Citizenship Clause” without overruling the *Insular Cases*).

birthright citizenship is found to extend to the territories, then a treaty of free association remains possible, but unqualified independence would become impossible. There has not yet been a serious attempt to address the unique scenario where the *Insular Cases* survive, maintaining the territories' legal separation from the United States, despite the extension of Fourteenth Amendment birthright citizenship, which is considered below.

A. *Intimate Association is the Best Alternative to the Status Quo*

A ruling that maintains the *Insular Cases*, but extends Fourteenth Amendment birthright citizenship would make unqualified independence for any territory legally impossible.¹⁸² This would remove complete independence as a choice for any territory and necessitate finding some method for representation and self-government within the American system.¹⁸³ Puerto Rico, given its population, is an obvious candidate for statehood,¹⁸⁴ but the same might not be true for the other territories.¹⁸⁵ The other territories' much smaller populations make them problematic candidates, ironically because of potential

¹⁸² See *supra* Parts V.A, V.B.

¹⁸³ *Id.*

¹⁸⁴ Especially because its accession to statehood is publicly supported by both the Democratic and Republican parties. See DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 21 (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf [<https://perma.cc/DY4C-8YR4>] (appearing to additionally contemplate the possibility of independence); COMM. ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016 30 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/V67P-ZBQK>].

¹⁸⁵ Compare *Puerto Rico*, CIA WORLD FACTBOOK (2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> [<https://perma.cc/9NBS-6CZD>] (estimating a population of 3,294,626 people as of July 2018), with *District of Columbia Population 2019*, WORLD POPULATION REV. <http://worldpopulationreview.com/states/district-of-columbia-population/> [<https://perma.cc/Q6PM-HADK>] (estimating a population of 702,455 in 2018), and *Wyoming Population 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/wyoming-population/> [<https://perma.cc/2R U8-3X4G>] (estimating a population of 577,737 in 2018). See also *American Samoa*, CIA WORLD FACTBOOK (2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> [<https://perma.cc/6AQX-5LRT>] (estimating a population of 50,826 in 2018); *Guam*, CIA WORLD FACTBOOK (2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html> [<https://perma.cc/9GG9-XZ95>] (estimating a population of 167,772 in 2018); *Northern Mariana Islands*, CIA WORLD FACTBOOK (2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/cq.html> [<https://perma.cc/HC62-MH8N>] (estimating a population of 51,994 in 2018); *Virgin Islands*, CIA WORLD FACTBOOK (2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/vq.html> [<https://perma.cc/JKN2-9M8L>] (estimating a population of 106,977). It is further interesting to note the *CIA World Factbook* maintains separate statistics for the territories separate from the United States as a whole.

overrepresentation.¹⁸⁶ If a ruling such as that described above in Part V.B occurs, a relationship modeled on free association,¹⁸⁷ but much more intimate, offers an excellent compromise solution.

Under the Part V.B scenario, a form of free association, where the United States guarantees existing rights and privileges by treaty, would permit a territory to gain independence. The guarantees must be constructed to not dilute, shift, or cancel citizenship rights to avoid offending *Afroyim*.¹⁸⁸ *Texas v. White* suggests that constitutional, full citizenship within the Union would prevent any territory from gaining independence.¹⁸⁹ However, if territorial incorporation survives and the Citizenship Clause is applicable in unincorporated territories, that application should operate subject to practical circumstances and cannot cause impracticable or anomalous effects.¹⁹⁰ An interpretation of the Citizenship Clause funneled through territorial incorporation should find a grant of independence *with* a treaty of intimate free association—an agreement of “intimate association”—valid, even under a newly heightened standard for congressional governance of the territories.

The great advantage of intimate association is that it could, properly drafted, preserve the status quo, allay concerns about threats to local culture and traditions, and also be recognized by the U.N. as a valid form of self-government.¹⁹¹ Given the minimal requirements for a compact of free association,¹⁹² the United States and each territory could craft a treaty meeting their specific needs and new constitutional requirements.

Crucially, the treaty must pass the *Afroyim* citizenship test that Fourteenth Amendment citizenship, once acquired, cannot be “shifted, canceled, or diluted.”¹⁹³ Such a high standard requires any treaty to incorporate the individual rights protected by the U.S. Constitution into the territory-cum-

¹⁸⁶ See Eric W. Orts, *The Path to Give California 12 Senators and Vermont Just One*, ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/> [<https://perma.cc/FCV2-WCC8>] (advocating proportional reform to the Senate because over-allocation to small-population states is “untenable” on numerical and racial grounds). It is also interesting to note he considers the status of Puerto Rico and Washington, D.C., but no other territories. *Id.*

¹⁸⁷ See Wentworth, *supra* note 36, at 28–33. Wentworth explains how a state in free association is a country whose constitution is determined without external interference; is freely entered into through a democratic process; and whose status can be unilaterally altered by the freely associated state, beyond which the treaty relationship can include any degree of economic aid, agreements to cede responsibility for defense, or even to cede diplomatic affairs. *Id.*

¹⁸⁸ See *supra* Part IV.B.

¹⁸⁹ See *supra* Part III.B.

¹⁹⁰ See *supra* Part III.A.2.

¹⁹¹ G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960) (recognizing free association as a valid form of self-government); see also *supra* text accompanying note 154 (discussing racial restrictions on land alienation in American Samoa, which meant to preserve indigenous land ownership and are of questionable constitutionality).

¹⁹² G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

¹⁹³ *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967).

country's constitution to prevent rights from being canceled. As the individual territories will surely maintain governments offering comparable constitutional protections, there should not be any rights problem resulting from the separation.¹⁹⁴ Similarly, access to government programs and support would likely need to remain the same as under American sovereignty to prevent citizenship from being diluted. If exact preservation is unworkable, Congress could create special versions to accommodate citizens of the new freely associated states or provide financial support for locally run alternatives similar to current agreements with Micronesia and the Marshall Islands.¹⁹⁵ Congress should also guarantee visa-free travel rights and the unconstrained movement of money and goods; security could be retained under this scheme if the United States continued to operate customs and border security services in the territories-cum-countries.¹⁹⁶

Afroyim's statement that citizenship cannot be shifted¹⁹⁷ is the most difficult standard. It faces a straightforward argument that free association, even if intimate, still shifts the duties of the U.S. government onto the newly independent government.¹⁹⁸ For this argument, the *Insular Cases*' recent reinterpretation may be crucial.¹⁹⁹ Without accommodation for differences in the territories, the *Afroyim* right to constitutional citizenship²⁰⁰ could very well prevent Congress from granting independence. If a decision similar to the one discussed above in Part V.B occurs, the concern for the "particular circumstances" and "possible alternatives which Congress ha[s] before it" could arguably render it "impracticable and anomalous"²⁰¹ to *prevent* Congress from minorly diluting citizenship rights in favor of increased self-government and protection of local culture.

Language preserving a territory's right to accession could strengthen the constitutionality of these treaties by underscoring the right of U.S. citizens living in independent territories to full membership in the Union. Concurrently, Congress should pass preemptive-enabling legislation that creates standing-offer terms for the territories-cum-freely-associated-states to be fully

¹⁹⁴ See *supra* note 42.

¹⁹⁵ *Compacts of Free Association*, U.S. DEP'T INTERIOR, OFF. INSULAR AFF., <https://www.doi.gov/oia/compacts-of-free-association> [<https://perma.cc/WA5V-4BRV>].

¹⁹⁶ See Wentworth, *supra* note 36, at 29–32 (discussing how the U.N. approved of New Zealand's free association agreement with the Cook Islands where New Zealand continued to maintain responsibility for external affairs and defense; Switzerland's agreement to conduct diplomatic relations for Liechtenstein; New Zealand's treaty to act as "a channel of communications" for The Independent State of Samoa's foreign affairs; and Bhutan's agreement to "be guided by" India in foreign affairs via a treaty).

¹⁹⁷ *Afroyim*, 387 U.S. at 262.

¹⁹⁸ See *supra* note 42.

¹⁹⁹ See *supra* Part III.A.2.

²⁰⁰ *Afroyim*, 387 U.S. at 262.

²⁰¹ *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957)).

incorporated into the Union if their governments determine that statehood or incorporation into a state is the best course for their people.

Above are the more important matters a constitutionally valid compact of intimate association would need to address under the Part V.B scenario. Such a treaty will necessarily be determined after lengthy negotiations and should be passed by the Senate.²⁰² The legal objective of such treaties would be to ensure the full rights and social guarantees American citizens possessed while living in the U.S. Territories would continue to apply unaltered after independence. The combined social and political objective is to create a space for the people of the territories to determine their own futures and their preferred relationship with the United States without congressional or judicial meddling. The major drawbacks would be the cost, both in political and actual capital. These guarantees would be expensive, and elected officials may be unwilling to fund programs for Americans living outside the country proper.²⁰³ Relatedly, the President can unilaterally terminate any treaty without notice, which could endanger the treaties in the event of a dispute.²⁰⁴

An intimate compact of free association would provide the positive elements of the status quo while minimizing, if not rectifying, the democratic deficit in the territories.²⁰⁵ Free association would also protect American Samoan culture and customs from unwanted encroachment by American constitutional law while preserving a close relationship with the United States.²⁰⁶ Because free association is recognized as a form of self-government by the U.N.,²⁰⁷ it would allow the territories to be removed from the list of non-self-governing territories that is a national embarrassment.²⁰⁸ While the compacts of intimate association are discussed in the wake of a Supreme Court decision upending territorial law, they could be created prior to such a decision. Implementation before the law changes would occur with minimal legalistic restraint and would preserve the most options.

²⁰² U.S. CONST. art. II § 2, cl. 2.

²⁰³ See generally Jessica Trisko Darden, *Federal Disaster Aid for Puerto Rico Isn't Foreign Aid—But Trump Acts that Way*, WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/13/federal-disaster-aid-for-puerto-rico-isnt-foreign-aid-but-trump-acts-that-way/?noredirect=on](https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/13/federal-disaster-aid-for-puerto-rico-isnt-foreign-aid-but-trump-acts-that-way/?noredirect=on&hpid=hp_perma.cc/WM7U-L75B) [https://perma.cc/WM7U-L75B].

²⁰⁴ See *Goldwater v. Carter*, 444 U.S. 996, 1005–06 n.1 (1979) (Rehnquist, J., concurring).

²⁰⁵ See *supra* Part V.A.

²⁰⁶ See *supra* note 191.

²⁰⁷ G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

²⁰⁸ See Peralta, *supra* note 27, at 256 (discussing how territorial status violates international law and arguing that some other status, such as free association, is needed).

B. *Seemingly Intuitive Alternative Solutions Are Wanting*

As always, the possibility exists to amend the Constitution;²⁰⁹ Congress is also capable of integrating the territories into existing states, likely requiring their consent.²¹⁰ Either of these options is valid under present law and would remain valid under any scenario the judiciary may invent.²¹¹ The difficulty of passing a constitutional amendment would likely be challenging to the point of infeasibility.²¹² Assuming an amendment could pass, it would restore a flawed status quo or entrench a system of unequal representation.²¹³ Unfortunately, a similar risk exists if Congress chooses to incorporate territories into states. These solutions, while they may appear attractive, risk being seriously flawed and are not necessary, making such extreme steps improper solutions.

1. *Constitutional Amendment*

Passing a constitutional amendment risks certain problems, most seriously that an amendment to provide representation for the territories in Congress could enshrine unequal representation in the Constitution. While the idea of securing some representation in Congress is desirable, if achieved at a status less than statehood, it *still* would be unequal. An amendment worth passing should not be treated as a resolution to the issue of territories in the American system of government, but rather as a tool to manage their transition to a desirable final status.

An amendment should account for the reality that the territories are *practically* a part of the United States and provide some voting representation for the territories in Congress, perhaps making their representatives in the House full members. The amendment should provide a mechanism requiring popular approval in the territory for any status changes Congress may enact. A related mechanism may be required for relinquishing constitutional citizenship rights, should a territory choose independence. The amendment could explicitly preserve the protections for local culture and customs recently read into territorial incorporation, which would be particularly beneficial to American Samoa.²¹⁴ Perhaps the amendment could create a constitutionally valid commonwealth status that would prevent Congress from meddling in territorial governments, similar to the sovereignty of states.

²⁰⁹ U.S. CONST. art. V.

²¹⁰ *Id.* at art. IV § 3.

²¹¹ See discussion *supra* Part V.

²¹² See Lawson, *supra* note 52, at 910; Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RES. CTR., <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> [https://perma.cc/UN2Z-CDF3].

²¹³ See *supra* note 27.

²¹⁴ See *supra* text accompanying notes 8, 52.

First, passing a constitutional amendment combined with the difficulty of the necessary debate makes the process an unrealistic solution from the start. Second, this amendment is no panacea and requires potentially uncomfortable trade-offs between substantive representation and equal representation. The territories cannot and should not be treated as states unless Congress is willing to admit them as states. A single representative in Congress would likely convey the second-class status the plaintiffs in *Fitisemanu* decry.²¹⁵ However, it would be an improvement upon the current non-voting delegate status. Further, if the Supreme Court is truly signaling an intention to alter the Incorporation Doctrine in the future,²¹⁶ the precise wording of this amendment will likely become the focus of a major interpretative debate and could produce uncertain consequences, however it may be worded and whatever it contains.²¹⁷ For those reasons, a constitutional amendment is not a preferable solution.

2. *Combination with Existing States*

The territories could be incorporated into states with their consent. This solution seems attractive but suffers from similar problems as a constitutional amendment. First, it assumes the consent of a state,²¹⁸ which may not be given. Second, it assumes the consent of the territorial populations, which is not a given.²¹⁹ Third, this solution would not protect indigenous cultures and customs from constitutional scrutiny whatsoever.²²⁰ Fourth, and perhaps most seriously, this solution assumes essentially becoming a county within a state would solve the problem of representation. It is easy to imagine the few state legislators representing an erstwhile territory being overwhelmed by their new peers from the original state. Similarly, the small populations might merely be folded into existing congressional districts, rather than gaining any of their own.²²¹ This

²¹⁵ See *Fitisemanu* Complaint, *supra* note 9, at 18–24.

²¹⁶ See *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”).

²¹⁷ *Id.*

²¹⁸ Geographically, the best candidate to absorb American Samoa, Guam, and the Northern Mariana Islands would be Hawaii. The U.S. Virgin Islands and Puerto Rico could conceivably be incorporated into Florida, but the larger population of Puerto Rico makes it a better candidate for statehood itself.

²¹⁹ If the state in question consented, Congress has the power to force territories to accept this, but that would be attempting to right one wrong with another. See U.S. CONST. art. IV, § 3.

²²⁰ See *supra* note 154.

²²¹ Hawaii currently has two representatives, each with a district containing approximately 710,000 people. *Hawaii*, GOVTRACK, <https://www.govtrack.us/congress/members/HI#representatives> [<https://perma.cc/2S8K-QRDJ>]. American Samoa, Guam, and the Northern Mariana Islands have a combined population of approximately 270,000 people. See *supra* text accompanying note 185. It is likely the interests of each specific territory’s population would be substantially diluted.

purported solution risks displacing the distant and unmotivated government in Washington with another in Honolulu or San Juan. Combination with another state could be a proper final status for certain territories, and should not be removed as an option, but it cannot be the only option.

VII. CONCLUSION

The Constitution offers inadequate guidance for the future of the territories, and territorial jurisprudence is based upon a century-old unconstitutional policy decision made by the Supreme Court. The Court, in its last case addressing territorial incorporation, signaled that “over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance.”²²² The *Fitisemanu* plaintiffs point to this with hope,²²³ but it could as easily be observed with dread. A rapid change to such a vast precedent underpinning so many laws and policies would cause tremendous uncertainty and further prevent Congress from taking responsibility for the unincorporated territories. Congress, whatever it chooses to do, must act and seek a solution preserving what is beneficial in the present system while providing more genuine self-government. The sad truth is that not everyone can win: either American patriots or Puerto Rican nationalists will eventually be disappointed. Mr. Fitisemanu may gain his citizenship, but the people in his homeland may have their government thrown into disarray. *Fitisemanu* is the second court case contesting American Samoan citizenship,²²⁴ and more are sure to come. This will likely continue until the Supreme Court is forced to weigh in. The territories are similarly situated to a fine dinner set, and the doctrine of territorial incorporation is the tablecloth beneath it. Congress can choose to clear the table at any time, but the longer it waits, the greater the risk that the Supreme Court may enter and rip out the tablecloth. The finery may remain in place or come crashing to the ground. Congress has abdicated its responsibility for too long. It should act before the Court intervenes.

²²² *Boumediene*, 553 U.S. at 758.

²²³ *Fitisemanu* Complaint, *supra* note 9, at 31–32.

²²⁴ See generally *Tuaua v. United States*, 788 F.3d 300 (2015).